

State of Colorado



Bill Owens
Governor

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State Personnel Board
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AGENDA PUBLIC BOARD MEETING February 21, 2006

A public meeting of the State Personnel Board will be held on Tuesday, February 21, 2006, at the Colorado Department of Human Services, Colorado Mental Health Institute at Pueblo, 1600 West 24th Street, Conference Room A, Pueblo, Colorado 81003. The public meeting will commence at 9:00 a.m.

Those persons who wish to attend the meeting in Denver may come to the Colorado State Personnel Board at 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604, at 9:00 a.m. to attend the meeting via teleconferencing.

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-866-3300 by February 16, 2006.

I. REQUESTS FOR RESIDENCY WAIVERS

A. February 1, 2006 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

A. Petition for Declaratory Order of Barry Rice v. Trustees of the State Colleges in Colorado, Auraria Higher Education, Auraria Media Center, State Personnel Board case number 2006D002.

In Wells and Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, Auraria Library and Auraria Higher Education Center, State Personnel Board case number 2002B092(C), Complainants appealed their layoffs by Respondent University of Colorado at Denver ("UCD") and Respondent Auraria Higher Education Center's ("AHEC") failure to implement their retention rights. Wells sought back pay, interest, attorney fees and costs, and reinstatement to his former position, or employment with the University of Colorado at Denver; Rice sought reinstatement, back pay, interest, costs and attorney fees. After hearing, the ALJ ordered that, with regards to Wells, Respondent UCD's actions were affirmed and Respondent AHEC's actions were affirmed; with regards to Rice, Respondent UCD's actions were affirmed. However, AHEC was ordered to appoint Rice to a Telecommunication/Electronic Specialist II position and to pay Rice back pay and benefits, with an offset for any unemployment compensation or other type of compensation received, from April 15, 2002, to the date of reinstatement. On June 23, 2003, the Initial Decision of the Administrative Law Judge

was issued.

On December 19, 2003, the Board voted to adopt the Findings of Fact and Conclusions of Law 1, 2 and 4, in the Initial Decision of the Administrative Law Judge, but to reverse the Administrative Law Judge on Conclusion of Law 3 ("Respondent Auraria Higher Education Center's actions, with regards to Complainant Rice, were arbitrary, capricious or contrary to rule or law"). On January 21, 2004, a Notice of Appeal was filed with the Court of Appeals. On June 16, 2005, the Colorado Court of Appeals reversed the Board with regards to Conclusion of Law 3 and affirmed the ALJ's Initial Decision as a whole. On September 5, 2005, a Petition for Certiorari was filed by Petitioner/Appellant Dan Wells with the Colorado Supreme Court. This case is currently pending at the Colorado Supreme Court.

On January 19, 2006, Barry Rice filed a Petition for Declaratory Order, in relation to State Personnel Board case number 2002B092(C). Respondent filed a Response to the Petition for Declaratory Order on January 30, 2006.

B. Randy Pfaff v. Department of Corrections, State Personnel Board case number 2004B112(C).

On February 28, 2005, the Initial Decision of the Administrative Law Judge was issued. Respondent filed its Notice of Appeal on March 30, 2005. On August 16, 2005, the Board voted to adopt the findings of fact and conclusion of law No. 1 ("The corrective action was not arbitrary, capricious or contrary to rule or law") in the Initial Decision of the Administrative Law Judge and to reverse conclusions of law Nos. 2 ("Complainant did not commit the acts upon which discipline was based"), 3 ("Respondent's demotion of Complainant was arbitrary and capricious and contrary to rule or law"), and 4 ("Complainant is entitled to an award of attorney fees and costs incurred in appealing the demotion").

On September 14, 2005, Complainant filed a Notice of Appeal at the Court of Appeals, and the Board filed the Certificate of Record of Administrative Proceedings before the State Personnel Board at the Court of Appeals on December 9, 2005. On January 20, 2005, Complainant filed his Motion to Vacate Judgment Pursuant to C.R.C.P. 60(b); Respondent filed Respondent's Response in Opposition to Motion to Vacate Judgment Pursuant to C.R.C.P. 60(b) on January 27, 2006. On February 6, 2006, Complainant filed Complainant's Withdrawal of Motion to Vacate Judgment Pursuant to C.R.C.P. 60(b). On February 9, 2006, Respondent filed its Response to Complainant's Withdrawal of Motion to Vacate Judgment Pursuant to C.R.C.P. 60(b).

C. Petition for Declaratory Order of the Colorado Federation of Public Employees (CFPE) v. Department of Personnel and Administration, State Personnel Board case number 2006D003.

On February 8, 2006, CFPE filed a petition for declaratory order asking that the State Personnel Board act immediately to provide an interpretation of the law and guidance in the following areas, which CFPE asserts are within the Board's full jurisdiction and which were previously covered by the Director's Procedures: Director's Procedure 4-24 - Referrals for Multiple Vacancies, Director's Procedures 4-31 - Temporaries, and Procedures 10-3(F) and 10-5 - Personal Services Contracts.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

A. David Ruchman v. Department of Revenue, Enforcement Group, Hearings Division, State Personnel Board case number 2005B085.

Complainant, a hearing officer, appealed his disciplinary termination, seeking reinstatement, back pay, benefits and attorney fees and costs, and alleging a violation of First Amendment political association rights. After hearing, the ALJ determined that Respondent did not meet its burden of proving that Complainant willfully violated its Emergency Action Plan and the two orders of his superiors to immediately evacuate the building by taking longer than he should have to evacuate; approximately two minutes does not equate to a willful refusal to evacuate. In addition, the ALJ found that Respondent failed to give candid and honest consideration to the significant mitigation before it in this matter, and erroneously considered a corrective action which should have been removed from Complainant's personnel file, rendering a decision that was arbitrary and capricious and a disciplinary action that was not within the range of reasonable alternatives. The ALJ concluded that Respondent did not terminate Complainant in part for exercising his First Amendment political association rights and attorney fees are not warranted, thus rescinding the termination to allow for alternate disciplinary or corrective action, not to exceed a thirty-day suspension without pay, and awarding Complainant back pay and benefits to the date of reinstatement.

On September 26, 2005, the ALJ issued the Initial Decision of the Administrative Law Judge. Respondent appealed the Initial Decision and filed Respondent's Opening Brief on January 9, 2006. Complainant's Answer Brief was filed with the Board on January 30, 2006. Respondent's Reply Brief was filed on February 9, 2006.

B. Shelley Burke v. Department of Human Services, Division of Youth Corrections, Platte Valley Youth Service Center, State Personnel Board case number 2004B069.

Complainant, a correctional safety and security officer (CSSO), appealed her disciplinary termination, alleging discrimination based on disability and seeking rescission of the termination, reinstatement to a similar position in a different facility, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ concluded that Complainant committed none of the acts upon which she was disciplined, Respondent's actions were arbitrary and capricious, as Respondent had no factual basis upon which to discipline Complainant, and the preponderance of evidence demonstrated that Complainant was the best performer on her unit with respect to imposing discipline when appropriate and enforcing regulations designed to protect residents' health and safety. In addition, the ALJ found that Respondent did not discriminate against Complainant on the basis of disability, but did retaliate against Complainant for exercising her free speech rights. Rescinding the disciplinary termination, the ALJ ordered that Respondent reinstate Complainant to a CSSO position at a different facility, with full back pay and benefits, minus compensation she has earned from other sources after her termination, and reimburse her for attorney fees and other costs incurred in bringing this action.

On October 24, 2005, the ALJ issued the Initial Decision of the Administrative Law Judge. Respondent appealed the Initial Decision and filed Respondent's Opening Brief on January 17, 2006. Complainant's Answer Brief was filed with the Board January 31, 2006. On February 7, 2006, Respondent filed its Reply Brief.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Helen Bruckbauer v. Department of Transportation, State Personnel Board case number 2004G056(C).

Complainant, an Accountant II, with the Department of Transportation, filed a petition for hearing on December 29, 2003, arguing the final grievance decision was arbitrary and capricious because the appointing authority, Region Transportation Director Richard

Reynolds, stated that he was not signing her request for an upgrade from Accountant II to General Professional ("GP") IV due to Region 5 and the State's budget problems. In addition, Complainant argues that Respondent's actions are discriminatory based on sex and retaliation.

Respondent argues that Complainant failed to meet her burden of showing that valid issues exist that merit a full hearing, the Board lacks statutory authority to upgrade her position or place her in an upgraded position, the Board lacks jurisdiction to reinstate leave she has used or to appropriate money to pay her at the GP IV level, and Complainant has not established any basis for an order of attorney fees.

On February 9, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

B. Ida Archuleta v. Department of Human Services, Colorado State Veterans Center, State Personnel Board case number 2005B048.

Complainant, formerly employed as a Certified Nurses Aide, appealed the agency's refusal to reinstate her after she suffered a worker's compensation injury and an administrative separation for exhaustion of leave. She argues that the agency's refusal to reinstate her constitutes termination and is contrary to state and federal law.

Respondent argues that reinstatement is a discretionary appointment of an applicant into a position by an appointing authority, no rule or procedure in the personnel system gives Complainant a right to be reinstated, Complainant has failed to meet her burden of showing that a valid issue exists for hearing, and the Board lacks jurisdiction to grant Complainant a hearing on this matter.

On February 9, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

C. Julie Torvik v. Department of Public Health and Environment, Laboratory Services Division, State Personnel Board case number 2005G040.

Complainant, a probationary employee, contends she has legal standing to file her appeal because she was not discharged for poor performance. Complainant avers that she was discharged following a criminal background check and that her dismissal was contrary to rule under DPHE policy regarding background investigation and screening. Complainant asserts that her situation is not a "disqualifying offense for select agent handling positions" or a "disqualifying offense for individuals."

Respondent argues that no valid issues exist that would merit a hearing, as Complainant was terminated based on Board Rule R-6-9(5), which provides for termination of an employee upon "final conviction of a felony or other offense of mortal turpitude that ... may have an adverse effect on the department if employment is continued."

On January 10, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

D. Toni R. Lucci-Wolgamott v. Department of Natural Resources, Board of Land Commissioners, State Personnel Board case number 2005G044.

On November 12, 2004, Complainant filed her petition for hearing after her probationary employment with the Department of Natural Resources, Board of Land Commissioners, was terminated. Complainant argues that the decision to terminate her employment was in retaliation for protected conduct under the First Amendment of the U.S. Constitution and its state counterparts and under the Colorado Employee Protection Act, also known as the whistleblower act.

Respondent argues that Complainant has not met her burden of showing the existence of valid issues that merit a hearing and Complainant has not stated a valid retaliation claim.

On January 10, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be granted. On January 19, 2006, Respondent filed Respondent's Request for Materials to be Included in State Personnel Board Packet.

- E. Annette Collier v. Department of Human Services, Colorado State Veterans Home, State Personnel Board case number 2004B156.

Complainant, a probationary Client Care Aide II employed by the Department of Human Services, Colorado State Veterans Home, filed a petition for hearing on June 1, 2004, arguing her termination was unfair and did not follow procedures.

Respondent argues that Complainant failed to meet the burden of showing that valid issues exist that merit a full hearing and that Complainant's appeal should be dismissed with prejudice.

On January 11, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

- F. Chantal Smith v. Department of Human Services, Division of Child Welfare, State Personnel Board case number 2005G107.

Complainant, a certified General Professional IV employed by the Department of Human Services, Division of Child Welfare, filed a petition for hearing on May 16, 2005, arguing Respondent's actions were arbitrary and capricious because the appointing authority did not respond to her written grievance in a timely manner and because she is not compensated at the same level as her co-workers, who have less seniority than she has.

Respondent argues that Complainant failed to meet her burden of showing that grounds exist under § 24-50-123(3), C.R.S., and/or Board Rule R-8-49, 4 CCR 801, that merit a full hearing; the Board lacks jurisdiction to grant Complainant a pay raise; and Complainant's grievance was untimely so the Board cannot review the final grievance decision.

On January 23, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied. On February 2, 2006, Complainant filed a Motion to Reconsider Preliminary Recommendation of the Administrative Law Judge.

- G. Anthony Tweneboah-Koduah v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2005G068.

Complainant, a probationary Registered Nurse employed by the Department of Human Services, Colorado Veterans Home at Fitzsimons, filed a petition for hearing on January 19, 2005, arguing that his termination was unfair and racially motivated.

Respondent's argues that Complainant failed to meet his burden of showing that valid issues exist that merit a full hearing, he has failed to establish a *prima facie* case of discrimination, and his appeal should be dismissed with prejudice.

On January 26, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

H. Ron Harthan v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2006G034.

Complainant, a certified Wildlife Officer for the Division of Wildlife, Department of Natural Resources, filed a petition regarding the final grievance decision denying him a promotion based on his lack of a college degree, arguing that the promotional policy is inconsistent with Director's Procedure 4-13 and the qualifications listed for the position of Wildlife Manager II. Complainant argues that he has been performing the duties of a Wildlife Manager III without having the position.

Respondent counters that Complainant does not set forth facts in support of an allegation that the grievance procedures were violated and there is no constitutional right to have experience considered in the examination process. Complainant's equal protection arguments must fail because he is not similarly-situated to other persons who have promoted, as he does not have a degree and no longer performs certain duties of a Wildlife Manager III, rendering this argument moot.

On February 6, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

I. Erin M. Hutchinson v. Department of Human Services, Division of Youth Corrections, State Personnel Board case number 2006G036.

Complainant, a Youth Security Officer I at Zebulon Pike Youth Services Center, Department of Human Services, Division of Youth Corrections, appeals a disciplinary action that resulted in her demotion and reversion to her previously certified class, arguing that she was never given any corrective action or any performance evaluation.

Respondent counters that Complainant violated division policies, which occurred both before and during trial service, and those violations warrant returning her to her previously certified class and imposing a disciplinary action against her.

On February 9, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

J. Nanci Bravo v. Department of Human Services, Colorado State Mental Health Institute at Pueblo, State Personnel Board case number 2006G039.

Complainant, a Correctional Security Office II at Colorado State Mental Health Institute at Pueblo, Department of Human Services, filed a petition for hearing on December 9, 2005, alleging that she is the only employee in the department who has not received a 10% salary increase with her promotion. She also alleges that Sergeant Lylia Vezzani received a reallocation of a position which was never posted and requests equal treatment to Sergeant Vezzani.

Respondent counters that Complainant's appeal does not state a claim for which the Board can grant a hearing, the Board lacks jurisdiction to adjust Complainant's salary, and Complainant lacks standing to challenge the reallocation of Sergeant Vezzani's position.

On February 9, 2006, the Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge recommending that Complainant's petition for hearing be denied.

- K. Kevin W. Cook v. Regents of the University of Colorado, University of Colorado at Boulder, Housing Facilities Services, State Personnel Board case number 2006G012.

Complainant, a probationary employee was terminated from employment rather than being certified. Complainant seeks review on his claims of retaliation for opposing discriminatory practices and that the termination was a violation of public policy under the *Lorenz* doctrine and this State Employee Protection Act (whistleblower) claim.

Respondent argues that Complainant has failed to allege a *prima facie* showing any violation and that Complainant's factual allegations are untrue and that Complainant's termination occurred due to numerous performance issues.

On February 10, 2006 the Administrative Law Judge issued a Preliminary Recommendation, recommending Complainant's petition for hearing be granted on the issue of retaliation.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Patrick Ward v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2004B143 (February 2, 2006).

Complainant, a Wildlife Technician III, appealed his administrative termination from his position, alleging discrimination based on disability. After hearing, the ALJ determined that Respondent discriminated against Complainant on the basis of his disability in violation of the Colorado Anti-Discrimination Act with a threefold finding: (1) Complainant is disabled within the meaning of the Act; (2) Respondent violated its duty to reasonably accommodate Complainant's disability in two ways: first, by failing to engage in the interactive process, and second, by failing to timely conduct a vacant job search; and (3) Complainant is unable to perform the essential functions of the Wildlife Technician III position with or without accommodation. In addition, the ALJ concluded that Respondent violated its own "Return to Work/Modified Duty Policy" and Board Rules pertaining to the Americans with Disabilities Act coordinator, and its action was arbitrary and capricious. The ALJ rescinded Respondent's termination of Complainant and ordered that Complainant is reinstated with full back pay and benefits to the date of termination. The ALJ's order stated that, because Complainant was not able to perform the essential functions of his position with or without reasonable accommodation at the time of his termination from DNR, Respondent and Complainant are ordered to engage in the interactive process of reasonably accommodating him in a vacant position for a six-month period during which time he shall continue to receive front pay consisting of his full pay and benefits. Finally, the ALJ awarded Complainant reasonable attorney fees and costs.

VI. REVIEW OF THE MINUTES FROM THE JANUARY 17, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS JANUARY 17, 2006 PUBLIC MEETING:

- A. Perry Venard v. Department of Corrections, Arkansas Valley Correctional Facility, State Personnel Board case number 2000B114.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision of the Administrative Law Judge an Order of the Board.

- B. Emmanuel Toks Adeniran v. Department of Revenue, Colorado Lottery, State Personnel Board case number 2005G039.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- C. Pamela Cress v. Department of Human Services, State Personnel Board case number 2005S012.

The Board voted to reject the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

- D. Michael M. Kiley v. Department of Health Care Policy and Financing, State Personnel Board case number 2005S007.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

- A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

- B. OTHER BOARD BUSINESS

- Staff Activities

- C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the January 17, 2006 Executive Session
- C. Other Business

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NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

March 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
April 18, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
May 16, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
June 20, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
July 18, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
August 15, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
September 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
October 17, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
November 21, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604
December 19, 2006	Colorado State Personnel Board 633 17th Street, Suite 1400, Courtroom 1 Denver, CO 80202-3604